Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
Illinois Public Telecommunications Association, Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders	)	

COMMENTS OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL ON THE ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION'S PETITION FOR DECLARATORY RULING

Albert H. Kramer
Robert F. Aldrich
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, N.W.
Washington, DC 20037-1526
(202) 828-2226

Attorneys for the American Public Communications Council

August 26, 2004

TABLE OF CONTENTS

Page No.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
Illinois Public Telecommunications Association, Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders	)	

COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
ON THE ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION'S
PETITION FOR DECLARATORY RULING

The American Public Communications Council ("APCC") hereby supports the Illinois Public Telecommunications Association's ("IPTA's") request for a declaratory ruling that payphone service providers ("PSPs") generally and IPTA members in particular are entitled to refunds, back to April 15, 1997, of charges assessed by incumbent local exchange carriers ("ILECs")[1] for local exchange services used by PSPs,

[1] APCC's comments address the refund requirement as applied to the Bell Operating Companies ("BOCs"). In its petition, IPTA argues that non-BOC ILECs are also required to provide refunds. APCC agrees. IPTA relies on the Commission's 1996 and 1997 orders in which the Commission explicitly ruled that compliance with the new services test is a condition of all ILECs' eligibility to collect payphone compensation

to the extent that such charges exceed those that would have been collected had the rates complied with the FCC's new services test standard.

SUMMARY

As requested by IPTA, the Commission should rule that BOCs who have been required to reduce their payphone line rates[2] to comply with the new services test must provide refunds to PSPs, back to April 15, 1997, for all charges collected in excess of the new-services-test-compliant rates.

A ruling on this matter is urgently needed to end longstanding inequity to PSPs and their customers. The BOCs have exploited the Commission's processes by first agreeing to bring their payphone line rates into compliance with the new services test so that their payphones become eligible to receive dial-around compensation, and then delaying compliance as long as possible by obstinately maintaining, even in the face of

---

(Footnote continued)
under 47 U.S.C. § 276(b)(1)(A). *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), *recon.* 11 FCC Rcd 21233, ¶ 131 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in relevant part, Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert denied, Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998). The Commission subsequently ruled that a *different* provision of Section 276, 47 U.S.C. § 276(b)(1)(C), which expressly addresses safeguards to be applied to Bell Operating Companies, authorized application of the new services test only to the BOCs. *Wisconsin Public Service Commission, Order Directing Filings*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) ("*Wisconsin Order*"), *aff'd New England Pub. Comms. Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert denied*, 124 U.S. 2065 (2004). But the *Wisconsin Order* did not address the argument that Section 276(b)(1)(A) independently authorized the Commission to require both BOCs and non-BOC ILECs to comply with the new services test as a condition of being eligible to collect payphone compensation.

[2] "Payphone line rates" in these comments refers to rates for all local exchange services used by PSPs, including local usage rates. *Wisconsin Order*, ¶62-65.

clearcut FCC guidance, that their rates complied with the new services test. The BOCs even challenged this Commission's jurisdiction to order the BOCs to comply with the new services test, even though the BOCs had promised to do just that three years earlier.

As a result, the BOCs have reaped huge economic gains to which they were not entitled, and have unfairly deprived PSPs and their customers of the benefits of cost-based rates, to which PSPs *were* entitled. Allowing the BOCs to keep the excess payphone line charges in the face of their promise to refund those charges would undermine the integrity of the Commission's processes and reward the BOCs for their persistent refusal to comply with the *Payphone Orders*. Requiring refunds, on the other hand, will defend the integrity of the Commission's processes, make PSPs whole for their losses, and promote the widespread payphone deployment mandate of the Telecommunications Act.

Granting IPTA's requested ruling will also put an end to uncertainty and conflicts among state commission rulings. Commission guidance is needed to ensure correct application of a federal requirement implementing a federal statute, and to resolve conflicting state interpretations of this Commission's 1997 order requiring refunds.

While the BOCs continue to dispute PSPs' entitlement to refunds, there can be no dispute that the *Payphone Orders* required the BOCs to comply with the new services test in order to be eligible to collect dial-around compensation beginning April 15, 1997, and that the BOCs failed to timely comply with the new services test in Illinois and numerous other states. The logical and legal remedy for these violations of law is to require the BOCs to refund all charges they have collected since April 15, 1997 in excess

of new-services-test-compliant rates. For the reasons stated in IPTA's petition, such a remedy does not violate the filed rate doctrine or restrictions on retroactive rulemaking. And a refund of payphone line charges is clearly preferable to the only alternative – requiring the BOCs to disgorge all dial-around compensation collected while the BOCs were ineligible.

Even if the Commission were not otherwise authorized to require refunds of payphone line charges, the Commission has already lawfully ordered the BOCs to provide such refunds as a condition of the waiver granted in 1997 to enable the BOCs to begin collecting dial-around compensation. Thus, the Commission must rule that refunds are required as a straightforward implementation of its 1997 order. The arguments put forth by the BOCs in various proceedings to try to escape their obligation under this order are transparently fallacious. The 1997 waiver order mandates refunds in any state where the new or revised rates that are required in order to satisfy the new services test are lower than the BOC's pre-existing payphone line rates. The filed rate doctrine cannot prevent the Commission from ordering compliance with its lawful order, and even if it otherwise could, the BOCs explicitly waived reliance on that doctrine.

For all these reasons, the Commission must rule that the BOCs are required to provide refunds to PSPs for rates collected since April 15, 1997, in excess of new-services-test-compliant rates.

I. A RULING THAT PSPs ARE ENTITLED TO REFUNDS IS CRITICALLY NEEDED TO END LONGSTANDING INEQUITY TO PAYPHONE PROVIDERS AND USERS, DEFEND THE INTEGRITY OF THE COMMISSION'S PROCESSES, AND RESOLVE INCONSISTENT STATE APPLICATIONS OF FCC RULES

As the Commission noted in the *Wisconsin Order* and strongly emphasized in its recent order increasing the dial-around compensation rate to $.494 per call, payphones perform critical functions in the nation's telecommunications system.[3] Payphones cannot perform their vital role effectively, as Congress intended, unless PSPs are able to connect payphones to bottleneck local network facilities at reasonable, cost-based rates. By unlawfully depriving PSPs and their customers of the benefits of this Commission's rulings requiring cost-based payphone line rates, the BOCs have not only unjustly enriched themselves and undermined the integrity of the Commission's processes, but also have frustrated this Commission's duty to carry out its statutory mandate to promote widespread deployment of payphone services in the public interest. 47 U.S.C. § 276(b).

---

[3] *Wisconsin Order*, ¶3 (The payphone "remains a vital telecommunications link for many Americans"); *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, WC Dkt. No. 03-225, FCC 04-182, ¶ 20 (rel. August 12, 2004)("*Dial-Around Rate Order*"). As the Commission stated in the *Dial-Around Rate Order*:

> [P]ayphones are accessible on demand to consumers without initial investment or monthly charges, and provide a unique back-up communications option when subscription services – whether wireline or wireless – are unaffordable or unavailable. Payphone services are particularly critical to those with few other communications service options – including low-income customers, the elderly, and residents of rural areas. Payphone also enhance access to emergency (public health and safety) services.

Id.

A. Refunds Are The Necessary Remedy For The BOCs' Persistent Non-Compliance With The Commission's Payphone Orders

As IPTA explains, in order to combat LEC incentives to charge PSPs excessive rates for network services, the Commission's 1996 *Payphone Orders* required LECs to bring the rates charged PSPs into compliance with the new services test, and made such compliance a condition of each LEC's eligibility to collect compensation for their own payphones under Section 276(b)(1)(A) of the Act. *First Payphone Order*, ¶ 146, *First Payphone Reconsideration Order*, ¶¶ 131, 162-63. Shortly before the April 15, 1997 deadline for compliance with this requirement, the Commission issued an order reiterating that compliance with the new services test was a precondition for a LEC's eligibility to collect payphone compensation. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 20997, ¶¶ 30-33 (CCB 1997) ("*First Waiver Order*"). Claiming that they did not understand the Commission's prior orders, and recognizing that non-compliance jeopardized their eligibility for payphone compensation, the BOCs requested a temporary waiver of the new services test requirement to enable them to begin collecting dial-around compensation even though they had yet to bring their rates into compliance with the new services test. *See* Letter from Michael K. Kellogg to Mary Beth Richards, April 10, 1997 (attached as Attachment 1 to these comments) ("*First Kellogg Letter*"). In return, the BOCs agreed that, "where new or revised tariffs are required" in order to comply with the new services test, they would refund any charges collected from PSPs after April 15, 1997, in excess of the level of charges found to comply with the test. *See* Letter from Michael K. Kellogg to Mary Beth Richards, April 11, 1997, at 1 ("*Second Kellogg Letter*") (attached as Attachment 2 to these comments).

In the *Second Waiver Order*, the Commission granted the waiver, subject to the express condition that a BOC would "reimburse or provide credit to its customers for those payphone services from April 15, 1997, if newly tariffed rates, when effective, are lower than the existing rates." *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370, 21379-80, ¶ 20 (CCB 1997) (*"Second Waiver Order"*). *See also id.*, ¶¶ 2, 25.

At the time, the BOCs stated that in most states, ensuring compliance with the new services test "should not be too problematic." *First Kellogg Letter* at 1. In fact, ensuring BOC compliance has proven to be extremely difficult and time-consuming. When the BOCs made their filings pursuant to the *Second Waiver Order*, PSPs in many states petitioned their state public service commissions for a determination whether the rates complied with the new services test. In state proceeding after state proceeding, the BOCs stubbornly resisted making any reductions in their rates, obstinately maintaining that their rates fully complied with the new services test. *See generally* the state payphone association filings cited in the *Wisconsin Order*, ¶ 2, n.10. All the while, the BOCs were collecting dial-around compensation for which they would have been ineligible absent the waiver.

Beginning in 1999, a number of states found that BOC payphone line rates did not comply with the new services test and ordered the BOCs to lower their payphone line rates to comply with the new services test.[4] Numerous other state proceedings,

---

[4] *See, e.g.*, Indiana Utility Regulatory Commission, *Request of the Indiana Payphone Association for the Commission to Conduct an Investigation of Local Exchange Company Pay Telephone Tariffs for Compliance with Federal Regulations, and to Hold Such Tariffs in Abeyance Pending Completion of Such Proceeding*, Cause No. 40830, Final Order (October 6, 1999) (*"IURC 1999 Order"*), Order on Less Than All of the Issues (September 6, 2000) (*"IURC 2000 Order"*), Kentucky Public Service Commission, *Deregulation of Local*

however, remained mired in delay. After the FCC's Common Carrier Bureau issued its March 3, 2000 order clarifying the application of the new services test (*Wisconsin Public Service Commission*, Order, 15 FCC Rcd 9978 (CCB 2000)), the BOCs could no longer even colorably contend that their existing rates, which generally equaled or exceeded the rates charged to business end users, satisfied the test. Nonetheless, the BOCs continued to resist making any rate changes, and they also resorted to a new tactic. Three years after promising the FCC they would comply with the new services test, the BOCs now argued for the first time that the FCC had no jurisdiction to require BOC compliance. *Wisconsin Order*, ¶ 31 & n.74. This position was roundly rejected by the FCC and the court of appeals. *Id.*, ¶¶ 33-42; *NEPCC*, 334 F.3d at 75-78. As a result, additional state public service commissions have found that PSPs are entitled to lower rates.[5]

(Footnote continued)
Exchange Companies' Payphone Service, Case No. 361, Order (January 5, 1999) ("*KPSC Order*"); Public Service Commission of South Carolina, *Request of BellSouth Telecommunications, Inc. for Approval of Revisions to Its General Subscriber Service Tariff and Access Service to Comply with the FCC's Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Docket No. 97-124-C, Order Setting Rates for Payphone Lines and Associated Features (Order No. 1999-285, April 19, 1999) ("*SCPSC Order*"); Tennessee Regulatory Authority, *All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service As Required by Federal Communications Commission (FCC) Docket 96-128*, Docket No. 97-00409, Interim Order (February 1, 2001) ("*TRA Order*").

[5] *See, e.g.*, Illinois Commerce Commission, *Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, ICC Docket No. 98-1095, Interim Order at 46 (November 12, 2003) ("*ICC Order*"). Kentucky Public Service Commission, *Deregulation of Local Exchange Companies Payphone Service*, Case No. 361, Order (May 1, 2003). Massachusetts Department of Telecommunications and Energy, *Investigation by the Department of Telecommunications and Energy on its own motion regarding (1) implementation of Section 276 of the Telecommunications Act of 1996 relative to Public Interest*

The BOCs, however, have continued to try to retain the benefits of their stonewalling resistance to rate reductions. Now that they can no longer avoid bringing their rates into compliance, the BOCs have argued that they should not – indeed cannot legally – be required to disgorge the benefits of their evasion of compliance by refunding to PSPs the difference between the new rates and the non-complying rates they have been charging in violation of FCC rules since 1997.[6]

By successfully delaying compliance with the new services test for up to seven years, the BOCs have reaped huge economic gains to which they were not entitled, and have unfairly deprived PSPs and their customers of the benefits of cost based rates, to which PSPs *were* entitled. Only by requiring the BOCs to refund the difference between the rates in effect during those years and the rates that comply with the new services test can the Commission make PSPs whole for their losses and allow payphone users to belatedly enjoy the benefits that should have accrued years earlier. Allowing the BOCs to keep the excess charges they have collected would reward them for their persistent refusal to comply with the Commission's *Payphone Orders*. Furthermore, denying

---

(Footnote continued)
Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-Pay Line Service, and (4) the rate policy for operator service providers, D.P.U./D.T.E. 97-98/97-18 (Phase II), Order (June 23, 2004) ("*MDTE Order*"); Michigan Public Service Commission, *Michigan Pay Telephone Association v. Ameritech Michigan and GTE North Incorporated*, Case No. U-11756 (after remand), Opinion and Order (March 16, 2004) ("*MPSC Order*").

[6] In addition to the Illinois proceeding discussed in IPTA's petition, BOCs have recently opposed requests for refunds in, for example, Massachusetts, Michigan, and New York. *MDTE Order* at 31-32; *MPSC Order* at 24-25; *Independent Payphone Association of New York, Inc. v. Public Service Commission of New York*, Memorandum and Order (N.Y. Sup. Ct., App. Dir., No. 93539, March 25, 2004) ("*NY App. Court Order*").

refunds would undermine the integrity of the Commission's processes by demonstrating that promises made to the Commission in return for regulatory benefits need not be kept.

B. A Ruling On Refunds Is Necessary To Resolve State Public Service Commissions' Conflicting Interpretation And Application Of The FCC's Payphone Orders

Declaratory rulings are particularly appropriate when necessary to resolve uncertainty as to applicable law. 47 CFR § 1.2. In this case, a declaratory ruling that PSPs are entitled to refunds of excess line charges is particularly necessary and appropriate because state public service commissions have issued contradictory decisions on the issue, including inconsistent interpretations of this Commission's orders. As reflected in IPTA's petition, at least five state public service commissions have ruled that PSPs are entitled to refunds of payphone service charges collected by LECs in excess of the new-services-test compliant rate.[7] A number of other state public service commissions or courts, in addition to the ICC, have ruled, under comparable circumstances, that PSPs are *not* entitled to refunds.[8]

In the *Wisconsin* case, where the record showed "disparate applications of the new services test in various state proceedings," the Commission recognized the need "to assist states in applying the new services test to BOCs' intrastate payphone line

---

[7] *See IURC 1999 Order; IURC 2000 Order; KPSC Order; MPSC Order; SCPSC Order; TRA Order.* The IPTA Petition also cites public service commission decisions in Louisiana and Pennsylvania approving settlements that included refunds or lump sum payments tantamount to refunds. APCC's counsel is aware of other similar settlements, the details of which are subject to non-disclosure agreements.

[8] *See MDTE Order* at 32-34; *NY App. Court Order* at 5.

rates" by providing guidance as to the meaning and proper application of the new services test. *Wisconsin Order*, ¶ 2. As a result of the Commission's guidance, as noted above, a number of state public service commissions completed long-pending proceedings or modified prior rulings, finding that BOCs had failed to comply with the new services test and requiring them to reduce their payphone line rates.

State public service commissions have reached similarly disparate decisions as to the appropriate remedy for violations of the new services test, resulting in inconsistent implementation of this Commission's prior orders. Accordingly, to resolve this conflict as well, a ruling by this Commission is clearly required "in order to ensure compliance with the *Payphone Orders* and Congress' directives in section 276." *Id.*

C. The Refund Issue Is A Matter Of Federal Law That Is Appropriately Addressed By The FCC

Equally clearly, this Commission is the appropriate entity to issue a ruling as to the appropriate remedy for new services test violations. The new services test requirement was adopted by this Commission as part of a federal regulatory scheme to carry out a federal statute. Therefore, the Commission is well situated to determine the appropriate remedy for violations of the test. This is especially appropriate because the Commission has previously issued an order expressly requiring the BOCs to provide refunds. *Second Waiver Order*. Part of the conflict among state public service commissions has resulted from disparate interpretations of this order. *See, e.g., KPSC Order* at 7; *MDTE Order* at 34; *MPSC Order* at 26; *SCPSC Order* at 29-30; *TRA Order* at 26-27.

II. THE COMMISSION MUST RULE THAT BOCS WHO FAILED TO COMPLY WITH THE NEW SERVICES TEST MUST REFUND EXCESS LINE CHARGES BACK TO APRIL 15, 1997

Requiring the BOCs to refund excess line charges back to April 15, 1997 is the legal and logical remedy for the BOCs' failure to comply with the new services test requirement.

A. It Is Indisputable That The BOCs Were Required To Comply With The New Services Test As A Condition Of Being Eligible To Collect Dial-Around Compensation Beginning April 15, 1997, And Failed To Do So

There can be no dispute that in the *Payphone Orders*, as explained in Section I. above, the Commission required the BOCs to comply with the new services test in order to be eligible to collect dial-around compensation on April 15, 1997. *First Payphone Reconsideration Order*, ¶¶ 131, 162-63; *First Waiver Order*, ¶¶ 30-33. Moreover, there can be no dispute that SBC and other BOCs failed to timely comply with the new services test requirement, not only in Illinois but also in numerous other states. Based on the express, unchallenged rulings of this Commission, therefore, the BOCs were not eligible to collect dial-around compensation beginning April 15, 1997. Unquestionably, the BOCs have no right to keep dial-around compensation collected while they remained ineligible, unless and until they refund the payphone line charges unlawfully collected.[9]

---

[9] Arguably, an appropriate remedy for the BOCs' violations would be to require the BOCs to refund to interexchange carriers all dial-around compensation collected between April 15, 1997 and their dates of compliance with the new services test. As explained below, however, the more appropriate, logical, and legal remedy for this violation of FCC requirements is to require the BOCs to refund the excess payphone line charges collected between April 15, 1997 and their dates of compliance with the new services test.

B. The Appropriate Remedy For The BOCs' Failure To Comply With The New Services Test Is To Require The BOCs To Refund Excess Line Charges Back To April 15, 1997

1. Refunds Of Excess Payphone Line Charges Are The Appropriate Remedy Under Federal Law For The BOCs' Violations Of The New Services Test Requirement

As IPTA has explained, refunding unlawfully collected charges is the normal remedy under the Communications Act for carrier violations of the Act or of Commission rules. Where a carrier has been found to violate the Communications Act or rules issued thereunder, the Commission has clear authority to require the carrier to make whole those injured by such a violation. *See, e.g.*, 47 U.S.C. §§ 206, 208; *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001). Therefore, in order to remedy the violations of the new services test requirement committed by SBC and other BOCs, it is entirely appropriate and legally necessary to require those carriers to refund the charges they collected from PSPs in excess of new-services-test compliant rates.

Moreover, for the reasons stated by IPTA, such refunds do not violate the filed rate doctrine or the related restrictions on retroactive ratemaking. The filed rate doctrine exists to prevent carriers from *discriminating* among their customers by charging certain preferred customers special rates that differ from the "legal" tariffed rate. See 47 U.S.C. § 203; *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 128-29 (1990). Where a rate has been found unreasonable and thus unlawful, however, the filed rate doctrine clearly cannot prevent a regulatory agency from granting *nondiscriminatory* refunds of the unlawful portion of the charges to all affected customers. *Id.*

Requiring the BOCs to refund the excess line charges unlawfully collected is also clearly preferable to the alternative remedy that otherwise would be necessary –

requiring the BOCs to disgorge the compensation that they collected when they were not eligible to do so. Not only would a refund of dial-around compensation be far more onerous to the BOCs than a refund of excess line charges, but it would also provide a windfall for the carriers, who would have obtained the benefits of use of the BOCs' payphones without making any payment for such use. By contrast, a refund of excess line charges would not provide any windfall to PSPs, but would merely return to PSPs money that they should never have had to pay in the first place.

2. The Commission Can And Must Hold The BOCs To Their 1997 Promise to Refund Excess Line Charges

Even if the Commission were not otherwise authorized to require refunds of payphone line charges in excess of the new-services-test-compliant rate, the Commission was clearly authorized to make the provision of refunds a condition of permitting the BOCs to begin collecting dial-around compensation before they were eligible to do so, as the Commission did in the *Second Waiver Order*. As the BOCs agreed to this condition and benefited from the waiver granted in reliance on it, the Commission must rule that refunds are required as a straightforward application of the *Second Waiver Order*.

As noted in Section I, above, the issue of the appropriate remedy for BOC non-compliance was explicitly raised by the BOCs themselves shortly before the April 15, 1997, deadline for compliance. The BOCs belatedly acknowledged that they might not be in compliance as of the April 15 deadline, and requested a temporary waiver of the deadline to ensure that their rates were compliant. The FCC granted a waiver giving the BOCs until May 19, 1997 to make their compliance filings, provided that a BOC that was required to reduce rates in order to comply with the new services test must refund

the amounts collected in excess of the new-services-test-compliant rate between April 15, 1997, and the effective date of that rate.

Thus, the Commission, with the BOCs' consent, has determined that refunds were the appropriate remedy for non-compliance with the new services test and has legally subjected the BOCs to that remedy. To address the BOCs' acknowledged non-compliance, the Commission could have declared the BOCs ineligible to collect dial-around compensation until their rates were found to be in compliance, a process that could have taken a substantial length of time even with the BOCs highly motivated to complete the proceedings. Rather than postpone the BOCs' eligibility for dial-around compensation – a result that would have significantly interfered with the transition to a competitive payphone market structure – the Commission and the BOCs agreed to a more logical and appropriate remedy. The Commission allowed the BOCs to begin collecting dial-around compensation immediately by granting a blanket waiver of non-compliance with the new services test, subject to the condition that, in the event that the BOCs were required to reduce rates in order to comply, the BOCs must make whole the PSPs injured by such non-compliance by refunding the benefits gained by non-compliance – *i.e.*, the excess payphone line charges collected. It would make a mockery of the Commission's *Second Waiver Order* if the Commission allows the BOCs to succeed in their attempt to have it both ways – to retain both the dial-around compensation they have collected pursuant to the *Second Waiver Order and* the excessive payphone line charges they have collected from PSPs for years in violation of the *Payphone Orders*.

The BOCs have argued in various state proceedings that the *Second Waiver Order* is somehow inapplicable. For example, SBC argued in Illinois that it did not file a "new rate" in reliance on the *Second Waiver Order*, but only filed a cost justification for its

existing rates. *ICC Interim Order* at 39. Accordingly, SBC contends that it did not rely on the blanket waiver granted by the FCC and is not bound by the waiver conditions. This argument is not only perverse,[10] but fallacious. The key determinant of whether the *Second Waiver Order* applies is not whether the BOC voluntarily reduced its rates, but whether "new or revised tariffs are required." *Second Kellogg Letter* at 1.

The purpose of the *Second Waiver Order* was not to force the BOCs to reduce rates that they believed were already in compliance with the new services test. Rather, the purpose was to enable BOCs whose rates might or might not be in compliance by April 15, 1997, to cover themselves against the possibility of non-compliance by taking additional time to review their line rates and making a compliance filing by May 19, 1997. In that filing, the BOC could raise its rates, lower its rates, or file a cost justification to show that the existing rates already complied; whatever the BOC filed, the BOC would qualify for the waiver. The FCC's order required BOCs to refund excess charges "if newly tariffed rates, *when effective,* are lower than the existing rates." *Second Waiver Order,* ¶ 20 (emphasis added). Thus, it is irrelevant whether the rate *filed* by the BOC, or asserted to be new-services-test compliant, was lower than the existing rate. Refunds are required if the rate that actually *became effective* after review by the state

---

[10] Even if SBC did not "rely on" the FCC's waiver, that does not change the fact that SBC violated the FCC's *Payphone Orders* by collecting dial-around compensation without complying with the new services test. As explained by IPTA, to remedy that violation there are only two alternatives: disgorge the benefits gained by non-compliance with the new services test, or disgorge the illegally collected dial-around compensation. The amount of dial-around compensation collected by SBC and other BOCs from IXCs since April 15, 1997, far exceeds the amount of line charges improperly collected from PSPs. By arguing that it should not have to refund the excess line charges, SBC perversely subjects itself to the alternative and far more onerous remedy.

public service commission in accordance with the correct standard was lower than the existing rate.[11]

SBC and other BOCs have also argued that the *Second Waiver Order* cannot be enforced because it violates the filed rate doctrine. As IPTA has demonstrated, however, the filed rate doctrine has no application here. Moreover, in their letters requesting a waiver, the RBOCs expressly waived any filed-rate-doctrine claim. The RBOCs stated:

> Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997. (I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance. . . .)

First Kellogg Letter at 2.

---

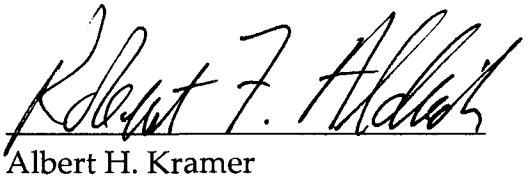
[11] In most if not all states, BOCs elected to make compliance filings on May 19, 1997. Whether or not they proposed rate reductions, these filings typically made reference to the *Second Waiver Order* and gave every indication that they were filed pursuant to that order. It would be utterly irrational to conclude that BOCs who made compliance filings on May 19, 1997, to justify their existing rates were choosing to "roll the dice" on their eligibility for compensation rather than to safeguard that eligibility.

CONCLUSION

For the foregoing reasons, the Commission should grant IPTA's petition for a declaratory ruling and rule that BOCs must provide refunds back to April 15, 1997 for all payphone line charges collected from PSPs in excess of new-services-test-compliant rates.

Dated: August 26, 2004

Respectfully submitted,



Albert H. Kramer
Robert F. Aldrich
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for the American Public Communications Council

ATTACHMENT 1

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900

FACSIMILE
(202) 326-7999

MICHAEL K. KELLOGG
PETER W HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK

April 10, 1997

Ex Parte Filing

Mary Beth Richards
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Mary Beth:

I am writing on behalf of the RBOC Payphone Coalition to request a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions, as set forth in the Commission's Orders in the above-captioned docket. I am also authorized to state that Ameritech joins in this request.

As we discussed yesterday, and as I explained in my Letter of April 3, 1997, none of us understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's "new services" test. It was our good faith belief that the "new services" test applied only to new services tariffed at the federal level. It was not until the Bureau issued its "Clarification of State Tariffing Requirements" as part of its Order of April 4, 1997, that we learned otherwise.

In most States, ensuring that previously tariffed payphone services meet the "new services" test, although an onerous process, should not be too problematic. We are gathering the relevant cost information and will be prepared to certify that those tariffs satisfy the costing standards of the "new services" test. In some States, however, there may be a discrepancy between the existing state tariff rate and the "new services" test; as a result, new tariff rates may have to be filed. For example, it appears that, in a few States, the existing state tariff rate for the COCOT line used by independent PSPs may be

too low to meet the "new services" test and will therefore have to be raised.

In order to allow deregulation to move forward and ensure that LEC PSPs are able to compete on a level playing field starting, as planned, on April 15, 1997, we propose that the limited waiver issued by the Commission on April 4 for interstate tariffs apply to intrastate payphone tariffs as well. Specifically, we request that the Commission grant us 45 days from the April 4th Order to file new intrastate tariffs, in those States and for those services where new tariffs are required. Each LEC will undertake to file with the Commission a written ex parte document, by April 15, 1997, attempting to identify those tariff rates that may have to be revised.

Unlike with federal tariffs, there is of course no guarantee that the States will act within 15 days on these new tariff filings, particularly where rates are being increased pursuant to federal guidelines. Provided, however, that we undertake and follow-through on our commitment to ensure that existing tariff rates comply with the "new services" test and, in those States and for those services where the tariff rates do not comply, to file new tariff rates that will comply, we believe that we should be eligible for per call compensation starting on April 15th. Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997. (I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance. Moreover, we will not seek additional reimbursement to the extent that tariff rates are raised as a result of applying the "new services" test.)

The LECs thus ask the Commission to waive the requirement that effective intrastate payphone tariffs meet the "new services test," subject to three conditions: (1) LECs must file a written ex parte with the Commission by April 15, 1997, in which they attempt to identify any potentially non-compliant state tariff rates, (2) where a LEC's state tariff rate does not comply with the "new services" test, the LEC must file a new state tariff rate that does comply within 45 days of the April 4, 1997 Order, and (3) in the event a LEC files a new tariff rate to comply with the "new services" test pursuant to this waiver, and the new tariff rate is lower than the previous tariff rate as a result of applying the "new services" test, the LEC will undertake

(consistent with state regulations) to provide a credit or other compensation to purchasers back to April 15, 1997.

The requested waiver is appropriate both because special circumstances warrant a deviation from the general rule and because the waiver will serve the public interest. Because the federal "new services" test has not previously been applied to existing state services -- and because the LECs did not understand the Commission to be requiring such an application of the test until the Commission issued its clarification order just a few days ago -- special circumstances exist to grant a limited waiver of brief duration to address this responsibility. In addition, granting the waiver in this limited circumstance will not undermine, and is consistent with, the Commission's overall policies in CC Docket No. 96-128 to reclassify LEC payphone assets and ensure fair PSP compensation for all calls originated from payphones. And competing PSPs will suffer no disadvantage. Indeed, the voluntary reimbursement mechanism discussed above -- which ensures that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up -- will ensure that no purchaser of payphone services is placed at a disadvantage due to the limited waiver.

Accordingly, we request a limited waiver, as outlined above, of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions.

We appreciate your urgent consideration of this matter. Copies of this letter have been served by hand on the APCC, AT&T, MCI and Sprint.

Yours sincerely,

Michael K. Kellogg

cc: Dan Abeyta
Thomas Boasberg
Craig Brown
Michelle Carey
Michael Carowitz
James Casserly
James Coltharp
Rose M. Crellin
Dan Gonzalez
Christopher Heimann
Radhika Karmarkar
Regina Keeney
Linda Kinney
Carol Mattey
A. Richard Metzger
John B. Muleta
Judy Nitsche
Brent Olson
Michael Pryor
James Schlichting
Blaise Scinto
Anne Stevens
Richard Welch
Christopher Wright

ATTACHMENT 2

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900

FACSIMILE
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK

April 11, 1997

Ex Parte Filing

Mary Beth Richards
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Comm'n
1919 M Street, N.W., Room 500
Washington, D.C. 20554

In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Mary Beth:

This letter will clarify the request I made yesterday on behalf of the RBOCs for a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions.

To the best of my knowledge, all the RBOCs have (or will by April 15, 1997, have) effective state tariffs for all the basic payphone lines and unbundled features and functions required by the Commission's order. We are not seeking a waiver of that requirement. We seek a waiver only of the requirement that those intrastate tariffs satisfy the Commission's "new services" test. The waiver will allow LECs 45 days (from the April 4 Order) to gather the relevant cost information and either be prepared to certify that the existing tariffs satisfy the costing standards of the "new services" test or to file new or revised tariffs that do satisfy those standards. Furthermore, as noted, where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.

I hope this clarification is helpful. Copies of this letter have been served by hand on the APCC, AT&T, MCI and Sprint.

Yours sincerely,

Michael K. Kellogg

cc:
Dan Abeyta
Thomas Boasberg
Craig Brown
Michelle Carey
Michael Carowitz
James Casserly
James Coltharp
Rose M. Crellin
Dan Gonzalez
Christopher Heimann
Radhika Karmarkar
Regina Keeney
Linda Kinney
Carol Mattey
A. Richard Metzger
John B. Muleta
Judy Nitsche
Brent Olson
Michael Pryor
James Schlichting
Blaise Scinto
Anne Stevens
Richard Welch
Christopher Wright

CERTIFICATE OF SERVICE

I hereby certify that, on August 26, 2004 , a copy of the foregoing Comments of The American Public Communications Council, was served by electronic mail and/or U. S. Mail, on the following parties as indicated below:

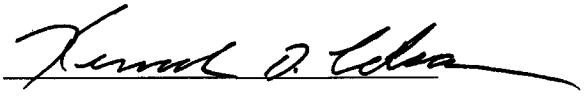
By Electronic Mail

Jon Stover
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
Room 5A-365
445 12th Street, SW
Washington, D.C. 20554
jon.stover@fcc.gov

Best Copy and Printing, Inc.
Portals II
445 12th Street SW
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

By Electronic and U.S. Mail

Michael W. Ward, Esq.
Illinois Public Telecommunications Association
1608 Barclay Blvd.
Buffalo Grove, Illinois 60089
mwward@dnsys.com



Kenneth D. Colson